

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

LORRAINE L. WILLIAMS,)	
)	No. CV-04-3143-MWL
Plaintiff,)	
)	ORDER GRANTING DEFENDANT'S
v.)	MOTION FOR SUMMARY JUDGMENT
)	
JO ANNE B. BARNHART,)	
Commissioner of Social)	
Security,)	
)	
Defendant.)	

BEFORE THE COURT are cross-Motions for Summary Judgment, noted for hearing without oral argument on October 3, 2005. (Ct. Rec. 12, 15). Plaintiff Lorraine L. Williams ("Plaintiff") filed a reply brief on September 19, 2005. (Ct. Rec. 22). Attorney D. James Tree represents Plaintiff; Special Assistant United States Attorney Leisa A. Wolf represents the Commissioner of Social Security ("Commissioner"). The parties have consented to proceed before a magistrate judge. (Ct. Rec. 7). After reviewing the administrative record and the briefs filed by the parties, the Court **GRANTS** Defendant's Motion for Summary Judgment (Ct. Rec. 15) and **DENIES** Plaintiff's Motion for Summary Judgment (Ct. Rec. 12).

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JURISDICTION

On August 17, 2001, Plaintiff protectively filed an application for Disability Insurance Benefits ("DIB"), alleging disability since October 4, 2000, based on back and shoulder injuries, possible nerve impingement, possible carpal tunnel syndrome, tendonitis - bilateral, neck pain and headaches. (Administrative Record ("AR") 131-134, 262, 283). The application was denied initially and on reconsideration. On January 27, 2003, Plaintiff appeared before Administrative Law Judge ("ALJ") Verrell Dethloff, at which time testimony was taken from Plaintiff, vocational expert William Cagle and Plaintiff's husband, Steven Ford. (AR 33-59). A supplemental hearing was held by the ALJ on March 10, 2003, where additional testimony was elicited from Plaintiff and Mr. Cagle to clarify vocational issues. (AR 60-69). On March 26, 2003, the ALJ issued a decision finding that Plaintiff was not disabled. (AR 22-32). The Appeals Council denied a request for review on November 26, 2004. (AR 11-14). Therefore, the ALJ's decision became the final decision of the Commissioner, which is appealable to the district court pursuant to 42 U.S.C. § 405(g). Plaintiff filed this action for judicial review pursuant to 42 U.S.C. § 405(g) on December 28, 2004. (Ct. Rec. 2).

STATEMENT OF FACTS

The facts have been presented in the administrative hearing transcript, the ALJ's decision, the briefs of both Plaintiff and the Commissioner and will only be summarized here. Plaintiff was 51 years old on the date of the ALJ's decision. (AR 32, 132). She stands approximately 5'6" tall, weighs about 136 pounds and,

1 has completed one semester of classes at the college level. (AR
2 41).

3 At the administrative hearing held on January 27, 2003,
4 Plaintiff stated that she last worked in 2000 at the Goodwill
5 Industries. (AR 36). She indicated that she was trained as a
6 cashier and worked as a pricer, sorter, ticketer and stockperson
7 at Goodwill from 1995 to 2000. (AR 36-37). At the supplemental
8 hearing held on March 10, 2003, Plaintiff testified that Goodwill
9 trained her for cashiering, but, because of her hearing
10 difficulties, she was moved to the production area and performed
11 work as a sorter, pricer, stocker and ticketer. (AR 63). She
12 stated that she worked as a cashier for about one year. (AR 63).

13 Plaintiff testified that, while working at Goodwill, she
14 injured her shoulder from constant, repetitive motion and injured
15 her back avoiding a falling box of glassware. (AR 37-38). Prior
16 to working at Goodwill, Plaintiff indicated that she worked for 23
17 years as a bartender, cocktail waitress, food server and cook.
18 (AR 38). As a bartender, she stated she ran a cash register many
19 times. (Ar 64).

20 Plaintiff testified that she spends her day trying to keep up
21 with household chores, she goes out with her husband once every
22 two weeks, and goes grocery shopping, with her husband's
23 assistance, about once a week. (AR 39). She stated that, other
24 than her medication for her asthma, the only medication she was
25 taking at the time of the administrative hearing was Tylenol. (AR
26 41). Plaintiff indicated that she smokes about one-half to three-
27 quarters of a pack of cigarettes per day and occasionally drinks
28 alcohol. (AR 41-42).

1 Plaintiff stated that she has had neck pain and migraine
2 headaches since injuring her shoulder. (AR 43). She indicated
3 that she experienced migraine headaches about once a week. The
4 migraine headaches prevented her from working, because she became
5 nauseated. (AR 43). However, she further indicated that she has
6 not had a migraine headache since a week or two after she quit
7 working at the Goodwill. (AR 45). She stated that she has a
8 limited range of motion with her neck and has problems lifting
9 weight with her right arm and hand. (AR 45). She indicated that
10 she also has difficulty sleeping due to her shoulder and back
11 pain. (AR 42).

12 Plaintiff testified that she had her hearing tested in 1995
13 by the Department of Vocational Rehabilitation. (AR 46). She
14 indicated that the results of the testing revealed "a really bad
15 hearing loss" and since that time her hearing has gotten worse.
16 (AR 46). At the supplemental hearing held on March 10, 2003,
17 Plaintiff indicated that she did not wear hearing aids but had an
18 upcoming audiology test. (AR 63).

19 Since the shoulder injury, Plaintiff stated that she no
20 longer goes bowling and she is no longer able to do embroidery.
21 (AR 46-47). She cannot sit through a movie at the theater or at
22 home and is no longer capable of sweeping, mopping or vacuuming.
23 (AR 49). She indicated that she could wash the dishes, but it
24 takes her a long time because she does them a few at a time with
25 rests in between. (AR 49-50). Plaintiff also stated that she
26 could not grab and lift a gallon of milk out of the refrigerator
27 and needed assistance with heavy items while grocery shopping.
28 (AR 50). She indicated that she could sit for 15 minutes on a

1 good day before having to get up and stand for five to 10 minutes.
2 (AR 50-51). Plaintiff testified that the greatest distance she is
3 able to walk is probably about one-half of a block. (AR 42-43).

4 Vocational expert William Cagle testified at the
5 administrative hearing held on January 27, 2003, and again at the
6 supplemental hearing held on March 10, 2003. (AR 51-55, 64-68).

7 **SEQUENTIAL EVALUATION PROCESS**

8 The Social Security Act (the "Act") defines "disability" as
9 the "inability to engage in any substantial gainful activity by
10 reason of any medically determinable physical or mental impairment
11 which can be expected to result in death or which has lasted or
12 can be expected to last for a continuous period of not less than
13 twelve months." 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The
14 Act also provides that a Plaintiff shall be determined to be under
15 a disability only if his impairments are of such severity that
16 Plaintiff is not only unable to do his previous work but cannot,
17 considering Plaintiff's age, education and work experiences,
18 engage in any other substantial gainful work which exists in the
19 national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B).
20 Thus, the definition of disability consists of both medical and
21 vocational components. *Edlund v. Massanari*, 253 F.3d 1152, 1156
22 (9th Cir. 2001).

23 The Commissioner has established a five-step sequential
24 evaluation process for determining whether a person is disabled.
25 20 C.F.R. §§ 404.1520, 416.920. Step one determines if he is
26 engaged in substantial gainful activities. If he is, benefits are
27 denied. 20 C.F.R. §§ 404.1520(b), 416.920(b). If he is not, the
28 decision maker proceeds to step two, which determines whether

1 Plaintiff has a medically severe impairment or combination of
2 impairments. 20 C.F.R. §§ 404.1520(c), 416.920(c).

3 If Plaintiff does not have a severe impairment or combination
4 of impairments, the disability claim is denied. If the impairment
5 is severe, the evaluation proceeds to the third step, which
6 compares Plaintiff's impairment with a number of listed
7 impairments acknowledged by the Commissioner to be so severe as to
8 preclude substantial gainful activity. 20 C.F.R. §§ 404.1520(d),
9 416.920(d); 20 C.F.R. § 404 Subpt. P App. 1. If the impairment
10 meets or equals one of the listed impairments, Plaintiff is
11 conclusively presumed to be disabled. If the impairment is not
12 one conclusively presumed to be disabling, the evaluation proceeds
13 to the fourth step, which determines whether the impairment
14 prevents Plaintiff from performing work he has performed in the
15 past. If Plaintiff is able to perform his previous work, he is
16 not disabled. 20 C.F.R. §§ 404.1520(e), 416.920(e). If Plaintiff
17 cannot perform this work, the fifth and final step in the process
18 determines whether Plaintiff is able to perform other work in the
19 national economy in view of his residual functional capacity
20 ("RFC") and his age, education and past work experience. 20
21 C.F.R. §§ 404.1520(f), 416.920(f); *Bowen v. Yuckert*, 482 U.S. 137
22 (1987).

23 The initial burden of proof rests upon Plaintiff to establish
24 a *prima facie* case of entitlement to disability benefits.
25 *Rhinehart v. Finch*, 438 F.2d 920, 921 (9th Cir. 1971); *Meanel v.*
26 *Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999). The initial burden is
27 met once Plaintiff establishes that a physical or mental
28 impairment prevents him from engaging in his previous occupation.

1 The burden then shifts to the Commissioner to show (1) that
2 Plaintiff can perform other substantial gainful activity and (2)
3 that a "significant number of jobs exist in the national economy"
4 which Plaintiff can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498
5 (9th Cir. 1984).

6 **STANDARD OF REVIEW**

7 Congress has provided a limited scope of judicial review of a
8 Commissioner's decision. 42 U.S.C. § 405(g). A court must uphold
9 the Commissioner's decision, made through an ALJ, when the
10 determination is not based on legal error and is supported by
11 substantial evidence. See *Jones v. Heckler*, 760 F.2d 993, 995
12 (9th Cir. 1985); *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir.
13 1999). "The [Commissioner's] determination that a plaintiff is
14 not disabled will be upheld if the findings of fact are supported
15 by substantial evidence." *Delgado v. Heckler*, 722 F.2d 570, 572
16 (9th Cir. 1983) (*citing* 42 U.S.C. § 405(g)). Substantial evidence
17 is more than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d
18 1112, 1119 n.10 (9th Cir. 1975), but less than a preponderance.
19 *McAllister v. Sullivan*, 888 F.2d 599, 601-602 (9th Cir. 1989);
20 *Desrosiers v. Secretary of Health and Human Services*, 846 F.2d
21 573, 576 (9th Cir. 1988). Substantial evidence "means such
22 evidence as a reasonable mind might accept as adequate to support
23 a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971)
24 (citations omitted). "[S]uch inferences and conclusions as the
25 [Commissioner] may reasonably draw from the evidence" will also be
26 upheld. *Mark v. Celebrezze*, 348 F.2d 289, 293 (9th Cir. 1965).
27 On review, the court considers the record as a whole, not just the
28 evidence supporting the decision of the Commissioner. *Weetman v.*

1 *Sullivan*, 877 F.2d 20, 22 (9th Cir. 1989) (*quoting Kornock v.*
2 *Harris*, 648 F.2d 525, 526 (9th Cir. 1980)).

3 It is the role of the trier of fact, not this court, to
4 resolve conflicts in evidence. *Richardson*, 402 U.S. at 400. If
5 evidence supports more than one rational interpretation, the court
6 may not substitute its judgment for that of the Commissioner.
7 *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579
8 (9th Cir. 1984). Nevertheless, a decision supported by
9 substantial evidence will still be set aside if the proper legal
10 standards were not applied in weighing the evidence and making the
11 decision. *Browner v. Secretary of Health and Human Services*, 839
12 F.2d 432, 433 (9th Cir. 1987). Thus, if there is substantial
13 evidence to support the administrative findings, or if there is
14 conflicting evidence that will support a finding of either
15 disability or nondisability, the finding of the Commissioner is
16 conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir.
17 1987).

18 ALJ'S FINDINGS

19 The ALJ found at step one that Plaintiff has not engaged in
20 substantial gainful activity since her alleged onset date. (AR
21 31). At step two, the ALJ determined that Plaintiff has the
22 severe impairments of status post right shoulder arthroscopy and
23 subacromial decompression, status post remote back strain, and
24 cervical spondylosis, but that she does not have an impairment or
25 combination of impairments listed in or medically equal to one of
26 the Listings impairments. (AR 23). The ALJ concluded that
27 Plaintiff has the RFC to perform light exertion work, with the
28 limitation of 15 pounds lifting and carrying with the right arm,

1 and work above or at shoulder level limited to occasional. (AR
2 24, 28). At step four of the sequential evaluation process, the
3 ALJ found that, based on Plaintiff's ability to perform light
4 exertion level work, with limitations, coupled with the vocational
5 expert's testimony, Plaintiff could return to her past relevant
6 work as a sales attendant in the retail trade. (AR 31).
7 Accordingly, the ALJ determined at step four of the sequential
8 evaluation process that Plaintiff was not disabled within the
9 meaning of the Social Security Act. (AR 31-32).

10 ISSUES

11 Plaintiff contends that the Commissioner erred as a matter of
12 law. Specifically, she argues that:

13 1. The ALJ erred by failing to conclude that Plaintiff's
14 hearing loss was a severe impairment;

15 2. The ALJ erred by improperly rejecting the opinions of
16 Plaintiff's treating and examining physicians; and

17 3. The ALJ erred by failing to conduct an adequate step
18 four analysis to find that Plaintiff was capable of returning to
19 her past relevant work.

20 This court must uphold the Commissioner's determination that
21 Plaintiff is not disabled if the Commissioner applied the proper
22 legal standards and there is substantial evidence in the record as
23 a whole to support the decision.

24 DISCUSSION

25 **A. Severe impairment**

26 Plaintiff contends that the ALJ erred by concluding that her
27 hearing loss was not a severe impairment. (Ct. Rec. 13, pp. 13-
28 14). Plaintiff asserts that it is clear from the record that

1 Plaintiff has hearing problems, yet the ALJ failed to make mention
2 of it when evaluating Plaintiff's claim at step two. (Ct. Rec.
3 13, p. 14). The Commissioner responds that Plaintiff did not meet
4 her burden of establishing the existence of significant
5 limitations resulting from her alleged hearing loss. (Ct. Rec.
6 16, pp. 6-9). The undersigned agrees.

7 The regulations, 20 C.F.R. §§ 404.1520(c), 416.920(c),
8 provide that an impairment is severe if it significantly limits
9 one's ability to perform basic work activities. An impairment is
10 considered non-severe if it "does not significantly limit your
11 physical or mental ability to do basic work activities." 20
12 C.F.R. §§ 404.1521, 416.921. Plaintiff has the burden of proving
13 that she has a severe impairment. 42 U.S.C. § 423(d)(1)(A); 20
14 C.F.R. § 416.912. In order to meet this burden, Plaintiff must
15 furnish medical and other evidence that shows that she is
16 disabled. 20 C.F.R. § 416.912(a). In the absence of objective
17 evidence to verify the existence of an impairment, the ALJ must
18 reject the alleged impairment at step two of the sequential
19 evaluation process. SSR 96-4p.

20 In this case, the ALJ evaluated the evidence of record,
21 considered the hearing testimony, and concluded that Plaintiff did
22 not have a severe hearing impairment. (AR 23). The ALJ
23 specifically found that Plaintiff has the severe impairments of
24 status post right shoulder arthroscopy and subacromial
25 decompression, status post remote back strain and cervical
26 spondylosis, but made no mention of hearing loss. (AR 23).

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1 As noted by the Commissioner, Plaintiff bears the burden of
2 establishing the existence of a severe impairment. (Ct. Rec. 16,
3 p. 7). Plaintiff fails to demonstrate she disclosed any medical
4 evidence for the ALJ's review exhibiting that she was
5 significantly limited by a hearing impairment.

6 Plaintiff was evaluated by Rodney Thompson, M.S., CCC-A, at
7 Thompson Audiology & Hearing Aid Center on March 17, 2003. (AR
8 755-756). The results of the evaluation revealed a moderate to
9 moderately severe sensorineural hearing loss in the mid to high
10 frequencies and a moderate to severe high frequency sensorineural
11 hearing loss in the left ear, findings consistent with a history
12 of noise exposure. (AR 755). However, although the records from
13 the audiological evaluation were submitted to the Appeals Council
14 (AR 14, 755), there is no indication that the ALJ received this
15 evidence prior to making his March 26, 2003 determination in this
16 case.¹ Moreover, even if this report of moderate to severe
17 hearing loss had been submitted for the ALJ's review, Plaintiff
18 fails to show how this moderate to severe hearing loss resulted in
19

20 ¹42 U.S.C. § 405(g) expressly provides for remand where new
21 evidence is material and there is good cause for the failure to
22 incorporate the evidence in a prior proceeding. *Burton v.*
23 *Heckler*, 724 F.2d 1415, 1417 (9th Cir. 1984). To meet the
24 materiality requirement, the new evidence must bear directly and
25 substantially on the matter. *Id.* If new information surfaces
26 after the Commissioner's final decision and the claimant could
27 not have obtained that evidence at the time of the administrative
28 proceeding, the good cause requirement is satisfied. *Booz v.*
Secretary of Health and Human Services, 734 F.2d 1378, 1380 (9th
Cir. 1984). Even if Plaintiff could show good cause for failing
to submit the report at an earlier date, the undersigned finds
that the evidence is not sufficiently material to compel a remand
to the ALJ. The audiological evaluation provides no reasonable
basis for changing the outcome of the ALJ's decision in this
case.

1 significant limitations in her ability to do basic work
2 activities.

3 In addition, while Plaintiff asserted in her opening brief
4 that Dr. Rubin's physical RFC assessment noted a limitation on
5 exposure to concentrated noises (Ct. Rec. 13, p. 14), the record
6 reflects that Dr. Rubin found that Plaintiff should avoid constant
7 loud background noise, but did not otherwise find that Plaintiff
8 was restricted by hearing difficulties (AR 725).

9 Plaintiff fails to point to any medical evidence from
10 Plaintiff's physicians assessing any limitations related to
11 hearing loss, except for the audiological evaluation which may
12 never have been presented to the ALJ prior to his determination in
13 this matter. (Ct. Rec. 16, p. 8). An impairment is severe if it
14 significantly limits one's ability to perform basic work
15 activities. 20 C.F.R. §§ 404.1520(c), 416.920(c). Plaintiff did
16 not meet her burden at step two of the sequential evaluation
17 process to establish the existence of a severe hearing impairment.
18 42 U.S.C. § 423(d)(1)(A); 20 C.F.R. § 416.912. Accordingly, the
19 ALJ's determination at step two is without error in this case.

20 **B. Medical Opinions**

21 Plaintiff contends that the ALJ erred by rejecting the
22 opinions of Plaintiff's examining physicians, Saleem Khamisani,
23 M.D., and John Coker, M.D., and treating physicians, Gerardo R.
24 Melgar, M.D., and Theodore H. Palmatier, M.D. (Ct. Rec. 13, pp.
25 15-16). The Commissioner responds that the ALJ appropriately
26 considered and addressed the medical evidence of record. (Ct.
27 Rec. 16, pp. 9-13).

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1 In a disability proceeding, the courts distinguish among the
2 opinions of three types of physicians: treating physicians,
3 physicians who examine but do not treat the claimant (examining
4 physicians) and those who neither examine nor treat the claimant
5 (nonexamining physicians). *Lester v. Chater*, 81 F.3d 821, 839
6 (9th Cir. 1996). A treating physician's opinion is given special
7 weight because of his familiarity with the claimant and his
8 physical condition. *Fair v. Bowen*, 885 F.2d 597, 604-05 (9th Cir.
9 1989). Thus, more weight is given to a treating physician than an
10 examining physician. *Lester*, 81 F.3d at 830. However, the
11 treating physician's opinion is not "necessarily conclusive as to
12 either a physical condition or the ultimate issue of disability."
13 *Magallanes v. Bowen*, 881 F.2d 7474, 751 (9th Cir. 1989) (citations
14 omitted).

15 The Ninth Circuit has held that "[t]he opinion of a
16 nonexamining physician cannot by itself constitute substantial
17 evidence that justifies the rejection of the opinion of either an
18 examining physician or a treating physician." *Lester*, 81 F.3d at
19 830. Rather, an ALJ's decision to reject the opinion of a
20 treating or examining physician, may be *based in part* on the
21 testimony of a nonexamining medical advisor. *Magallanes*, 881 F.2d
22 at 751-55; *Andrews v. Shalala*, 53 F.3d 1035, 1043 (9th Cir. 1995).
23 The ALJ must also have other evidence to support the decision such
24 as laboratory test results, contrary reports from examining
25 physicians, and testimony from the claimant that was inconsistent
26 with the physician's opinion. *Magallanes*, 881 F.2d at 751-52;
27 *Andrews*, 53 F.3d 1042-43. Moreover, an ALJ may reject the
28 testimony of an examining, but nontreating physician, in favor of

1 a nonexamining, nontreating physician only when he gives specific,
2 legitimate reasons for doing so, and those reasons are supported
3 by substantial record evidence. *Roberts v. Shalala*, 66 F.3d 179,
4 184 (9th Cir. 1995).

5 As correctly noted by the Commissioner, Plaintiff fails to
6 identify with specificity the ALJ's alleged error in rejecting the
7 medical opinions of examiners Khamisani and Coker. (Ct. Rec. 16,
8 p. 10). Instead, Plaintiff's argument focuses on the ALJ's
9 rejection of Plaintiff's treating physicians, Drs. Melgar and
10 Palmatier, as related to Plaintiff's shoulder and back
11 impairments. (Ct. Rec. 13, pp. 15-16; Ct. Rec. 22, pp. 2-5).

12 The ALJ determined that Plaintiff has severe back and
13 shoulder impairments, and, as a result, Plaintiff has the RFC for
14 only light work, with the right arm limited to 15 pounds of
15 lifting and carrying, and work above or at shoulder level limited
16 to occasional only. (AR 23-24).

17 In reaching his RFC determination, the ALJ accorded weight to
18 the opinions of nonexamining physician, Dianne Rubin, M.D., who
19 completed a physical RFC assessment on November 8, 2000, and again
20 on December 11, 2001. (AR 24-25, 670-675, 721-728). On November
21 8, 2000, Dr. Rubin found that Plaintiff was restricted in that she
22 should only occasionally climb and balance, was limited in
23 reaching in all directions (including overhead), and should avoid
24 concentrated exposure to hazards. (AR 671-673). Dr. Rubin opined
25 that Plaintiff was not otherwise limited, including a finding that
26 Plaintiff had no established exertional limitations. (AR 671-
27 673). However, on December 11, 2001, after reviewing the updated
28 record, Dr. Rubin opined that Plaintiff could occasionally lift

1 and carry 20 pounds, frequently lift and carry 10 pounds, and
2 stand and/or walk or sit about six hours in an eight-hour workday.
3 (AR 722). Dr. Rubin also opined that Plaintiff would be limited
4 to no constant repetitive use of her right shoulder, never
5 climbing ladders, ropes or scaffolds, only occasionally stooping,
6 crouching or crawling, and should avoid concentrated exposure to
7 noise, fumes, odors, dusts, gases, poor ventilation, etc. and
8 hazards. (AR 722-725).

9 Dr. Rubin noted that Plaintiff had a right shoulder
10 arthroscopy with intra-articular debridement and subacromial
11 decompression for an impingement syndrome on August 10, 2000, and
12 that a six-week follow up to the surgery revealed "excellent
13 progress." (AR 727). Dr. Rubin indicated that doctor's notes
14 from December 14, 2000, released Plaintiff to work without
15 restriction, Dr. Palmatier also released her to work in early
16 January 2001, and February 2001 x-rays of the bilateral shoulders
17 were normal. (AR 727).

18 Dr. Rubin also indicated that medical reports noted
19 complaints of neck pain and chronic low back pain. (AR 727).
20 February 7, 2001 x-rays revealed disc space narrowing at C4-5,
21 C5-6 and C6-7 which Dr. Rubin reflected in her RFC determination
22 by restricting Plaintiff's overhead reaching. (AR 727). As to
23 Plaintiff's complaints of back pain, Dr. Rubin indicated that the
24 record did not reveal multiple medical visits for this complaint,
25 and Plaintiff's report of an MRI showing disk herniation was
26 unsubstantiated and unconfirmed by the x-ray reports. (AR 727).

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1 As noted above, "[t]he opinion of a nonexamining physician
2 cannot by itself constitute substantial evidence that justifies
3 the rejection of the opinion of either an examining physician or a
4 treating physician." *Lester*, 81 F.3d at 830. However, Dr.
5 Rubin's findings are supported by substantial record evidence.

6 As noted by the ALJ, an MRI of the cervical spine on April
7 25, 2000, indicated degenerative disc changes and spondylosis but
8 no herniation or evidence of significant nerve involvement. (AR
9 27, 538-539, 668-660). An examining neurosurgeon, John M.
10 Henderson, M.D., indicated that the MRI scan and x-rays of the
11 cervical spine demonstrated that any neck discomfort was likely
12 unrelated to her alleged shoulder pain. (AR 27, 665-666). An
13 orthopedist, Thomas L. Gritzka, M.D., agreed with the findings of
14 Dr. Henderson concluding that Plaintiff's symptoms were not due to
15 cervical problems but were more likely the result of a shoulder
16 abnormality. (AR 27, 658).

17 The ALJ further noted that on November 8, 2000, following an
18 August 10, 2000 surgery on her shoulder, Plaintiff's treating
19 physician, Thomas C. Kennedy, M.D., indicated that Plaintiff was
20 making satisfactory progress and it was recommended that she be
21 released to full duty work, without restriction, as of November
22 13, 2000. (AR 27, 680). Dr. Kennedy noted that Plaintiff had
23 informed him that she quit her job because she wanted to find a
24 different type of employment. (AR 680). On December 14, 2000,
25 Plaintiff presented to her treating physician, Dr. Palmatier and
26 reported shoulder pain. (AR 693). It was noted that Plaintiff
27 was doing computer training at home. (AR 27, 693). Dr. Palmatier
28 released her to normal duty work, without restriction, on December
14, 2000. (AR 27, 692).

1 On February 27, 2001, Plaintiff was examined by Chester S.
2 McLaughlin, M.D. (AR 27, 703-712). As noted by the ALJ, Dr.
3 McLaughlin assessed her with a 5% impairment of the right shoulder
4 and indicated lifting should be limited to 35 pounds. Dr.
5 McLaughlin indicated Plaintiff's examination revealed
6 nonphysiologic findings and subjective complaints in excess of her
7 objective findings. (AR 27, 709). He noted her neck pain was
8 probably referred from the shoulder, her grip strength on the
9 right was invalid, apparently due to lack of cooperation, she had
10 no signs of atrophy, and there was only a slight loss of motion in
11 the right shoulder and some pain in motion of the left. (AR 27,
12 710-712). Dr. McLaughlin opined that Plaintiff was employable on
13 a reasonably continuous basis, but should avoid overhead
14 activities using the right upper extremity. (AR 712).

15 The ALJ also referred to a November 15, 2001 consultative
16 examination performed by Dr. Khamisani. (AR 28, 713-717). Dr.
17 Khamisani concluded that Plaintiff's examination demonstrated a
18 lot of pain behavior, symptom magnification, and nonphysiological
19 findings. (AR 28, 717). He indicated that she should avoid
20 repetitive right upper extremity use at or above shoulder height,
21 lifting no more than 20 to 25 pounds with the right upper
22 extremity, limited repetitive motions of the neck, and, due to
23 possible degenerative arthritis of the lumbar spine, should avoid
24 repetitive bending, twisting, stooping, squatting and climbing.
25 (AR 28, 717).

26 As noted by the ALJ, Plaintiff was again examined by Dr.
27 Khamisani, in tandem with Dr. Coker, on December 23, 2002. (AR
28 28, 729-741). It was noted that constant overhead use of the

1 right arm eliminated work as a sorter at Goodwill. (AR 28, 739).
2 The doctors found a 9% limitation on the right shoulder and opined
3 that Plaintiff should be limited to lifting 10 to 15 pounds with
4 the right arm with the avoidance of use of the right arm above
5 shoulder height. (AR 28, 738-739).

6 With regard to Plaintiff's argument as to Dr. Palmatier,
7 Plaintiff does not specify which report in the administrative
8 record supports her assertion that the ALJ erred in his assessment
9 of the evidence regarding Plaintiff's shoulder impairment. (Ct.
10 Rec. 13, 22). However, a review of the record reveals that the
11 vast majority of the reports from Dr. Palmatier reference a time
12 prior to Plaintiff's alleged onset date of October 4, 2000. (AR
13 484-517, 569-604, 611-643). It appears that the report Plaintiff
14 relies on in support of her argument with regard to Dr. Palmatier
15 is a January 14, 2000 report which indicated that Plaintiff could
16 work up to six hours per day, four days per week, with no lifting
17 or reaching above shoulder height with her right arm and no
18 lifting exceeding 10 pounds. (AR 602). Less than 11 months
19 later, Dr. Palmatier would opine that Plaintiff could return to
20 normal duty work with no restriction. (AR 700-702). The duration
21 requirements of the act require an impairment to be disabling for
22 12 continuous months. 42 U.S.C. § 1382c(a)(3)(A).

23 The reports of Dr. Palmatier pertaining to the time period
24 Plaintiff claims she became unable to work indicate that Plaintiff
25 quit her job at Goodwill because she did not feel she could work
26 at a job that requires her to reach above shoulder level or
27 required repetitive use of her right arm. (AR 610). However, on

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1 October 6, 2000, Dr. Palmatier opined that Plaintiff could perform
2 the physical activities of the light duty job of store
3 greeter/stocker. (AR 608). On October 26, 2000, Dr. Palmatier
4 diagnosed Plaintiff with a shoulder sprain (post op Arthroscopy 8-
5 10-2000), and indicated that Plaintiff could work up to four hours
6 per day, lifting no greater than five pounds, with no bending, no
7 reaching above lower chest height and no repetitive use of hand
8 greater than six cycles per minute. (AR 605). However, on
9 November 8, 2000, Dr. Palmatier noted that Plaintiff's right
10 shoulder sprain had improved, and that she could return to normal
11 duty work with no restriction. (AR 700-702). On November 27,
12 2000, Plaintiff reported a worsening of her right shoulder sprain.
13 (AR 697). Nevertheless, Dr. Palmatier released her to normal duty
14 work with no restriction. (AR 696). Dr. Palmatier was of the
15 same opinion on December 14, 2000. (AR 692). On December 31,
16 2000, Dr. Palmatier indicated that the maximum medical improvement
17 had been reached and no further curative treatment was
18 recommended. (AR 690).

19 The substantial weight of the record evidence supports the
20 ALJ's finding that Plaintiff's shoulder impairment limits her to
21 the performance of light exertion work, with the right arm limited
22 to 15 pounds lifting and carrying, and work above or at shoulder
23 level limited to occasional. (AR 24, 28). The record medical
24 evidence supports the ALJ's reliance on the nonexamining physician,
25 Dr. Rubin. Dr. Palmatier's findings regarding Plaintiff's
26 shoulder impairment are not inconsistent with the opinions of Dr.
27 Rubin or the findings of the ALJ. Accordingly, the ALJ did not
28 err in this regard.

1 Plaintiff again fails to point to specific reports in the
2 administrative record which support her assertion that the ALJ
3 erred in his assessment of the evidence regarding Dr. Melgar's
4 opinion regarding her back impairment. (Ct. Rec. 13, 22).
5 Moreover, a review of the record reveals that all of the reports
6 from Dr. Melgar predate Plaintiff's alleged onset date of October
7 4, 2000. (AR 330-343, 472-473). Dr. Melgar treated Plaintiff from
8 May 1997 to August 1997, diagnosing her with low back pain and
9 chronic lumbar strain due to an on-the-job injury while at
10 Goodwill. (AR 330-343). Dr. Melgar still found that Plaintiff
11 could continue working four hours a day, and that she could
12 perform the duties of sorter-pricer and bin-ticketer at Goodwill.
13 (AR 330, 334). On October 9, 1998, Dr. Melgar completed a form
14 indicating that, despite her recurrent low back pain due to a
15 lumbar strain, Plaintiff's condition was fixed and stable, she
16 could lift up to 20 pounds, and she had no restrictions with
17 standing, walking, or sitting. (AR 472-473). Dr. Melgar's 1997
18 and 1998 reports do not support Plaintiff's assertion of greater
19 limitations than assessed by the ALJ. Dr. Rubin noted that the
20 record did not reveal multiple medical visits for back pain
21 complaints, and Plaintiff's report of an MRI showing disk
22 herniation was unsubstantiated and unconfirmed by the x-ray
23 reports. (AR 727). Dr. Rubin's findings, as well as the weight
24 of the record evidence, support the ALJ's determination that
25 "there is no documentation of any significant lumbar impairment,
26 nor any significant treatment of any lumbar impairment, other than
27 a very remote lumbar sprain." (AR 28).

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1 It is significant to note, as the ALJ did in this case (AR
2 30), that while the opinions of the physicians have varied over
3 time, all have indicated that Plaintiff can work despite her
4 limitations.

5 The ALJ's findings regarding Plaintiff's limitations and RFC
6 are supported by the weight of the evidence of record, including
7 the findings of Drs. Melgar and Palmatier, and are based on proper
8 legal standards. Thus, there is no error regarding the ALJ's RFC
9 determination in this case. The evidence of record supports the
10 ALJ's conclusion that Plaintiff is capable of performing light
11 exertion work, with the restrictions noted.

12 **C. Step Four Analysis**

13 Plaintiff lastly contends that the ALJ erred by failing to
14 conduct an adequate step four analysis. (Ct. Rec. 13, pp. 16-19).
15 The Commissioner responds that, given the ALJ's accurate RFC
16 determination, the ALJ properly relied on the vocational expert's
17 testimony to find that Plaintiff could perform her past relevant
18 work as a sales attendant in the retail trade. (Ct. Rec. 16, pp.
19 13-15).

20 At step four of the sequential evaluation process, the
21 Commissioner determines whether the claimant can perform work she
22 has performed in the past. If the claimant is able to perform her
23 past relevant work, she is not disabled. 20 C.F.R. §§
24 404.1520(e), 416.920(e). If the claimant meets her burden of
25 establishing she cannot perform this work, the burden shifts to
26 the Commission to show, at step five in the process, that the
27 claimant is able to perform other substantial gainful work in the
28 national economy in view of her age, education and work

1 experience. 20 C.F.R. §§ 404.1520(f), 416.920(f); *see, Bowen*, 482
2 U.S. at 137. Thus, the claimant has the initial burden of proving
3 she cannot perform her past relevant work, and only then does the
4 burden shift to the Commissioner to demonstrate that she can
5 perform a significant number of jobs in the national economy.
6 *Thomas v. Barnhart*, 278 F.3d 947, 955 (9th Cir. 2002).

7 Based on Plaintiff's ability to perform light exertion level
8 work, coupled with the vocational expert's testimony, the ALJ
9 found that Plaintiff could return to her past relevant work as a
10 sales attendant in the retail trade. (AR 31). As noted above,
11 the ALJ properly found no severe impairment as a result of an
12 alleged hearing loss and properly relied upon Dr. Rubin to find
13 that Plaintiff has the RFC to perform light exertion work with the
14 restrictions of carrying only 15 pounds with the right arm and
15 working at or above shoulder level on only an occasional basis.
16 *See, supra*. This RFC finding was supported by substantial
17 evidence and free of legal error. Accordingly, the hypotheticals
18 based on the ALJ's RFC determination, presented to the vocational
19 expert (AR 52, 65-66), and relied upon by the ALJ in making his
20 disability determination (AR 31) were also appropriate. The ALJ's
21 conclusion at step four of the sequential evaluation process that
22 Plaintiff could return to her past relevant work as a sales
23 attendant in the retail trade is thus based upon substantial
24 evidence and free of legal error. Plaintiff fails to demonstrate
25 otherwise.

26 CONCLUSION

27 Having reviewed the record and the ALJ's conclusions, this
28 Court finds that the ALJ's decision that Plaintiff is capable of

1 performing light exertion work, with the limitations noted,
2 including her past work as a sales attendant, is supported by
3 substantial evidence and free of legal error. Plaintiff is thus
4 not disabled within the meaning of the Social Security Act.
5 Accordingly,

6 **IT IS ORDERED:**

7 1. Plaintiff's Motion for Summary Judgment (Ct. Rec.
8 12) is **DENIED**.

9 2. Defendant's Motion for Summary Judgment (Ct. Rec.
10 15) is **GRANTED**.

11 3. The District Court Executive is directed to enter
12 judgment in favor of Defendant, file this Order, provide a copy to
13 counsel for Plaintiff and Defendant, and **CLOSE** this file.

14 **DATED** this 16th day of January, 2007.

15 s/Michael W. Leavitt
16 MICHAEL W. LEAVITT
17 UNITED STATES MAGISTRATE JUDGE
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